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From:

Sent: Fri 8/22/2008 8:54 AM

To:

Cc:

Subject: RE: TEFRA -- gut check

I agree with your analysis. See also Rev. Rul. 2004-88 (Disregarded entity is a pass-thru partner making the small partnership exception inapplicable [REDACTED]).

In [Harrell v. Commissioner](#), 91 T.C. 242 (1988) the court held that the application of the TEFRA procedures is determined at the beginning of the audit based on the partnership return rather than on subsequent adjustments/determinations). This case might also control the date on which the application of section 6231(g) is applied. Taxpayers could argue that TEFRA does not apply on this basis.

[REDACTED]

From:

Sent: Thursday, August 21, 2008 11:49 PM

To:

Cc:

Subject: TEFRA -- gut check

Hi ,

It was nice to see you at the CLE. When we talked, you told me I had 4 years and some months to continue to ask you TEFRA questions, so I am going to avail myself of the opportunity. I wanted to send the e-mail below to a revenue agent. I think its right, but I lack quite a bit of confidence when it comes to TEFRA. [REDACTED]

Thanks in advance

You asked for advice regarding whether your examination of ("Taxpayer") is subject to the unified partnership audit proceedings in IRC §§ 6221 through 6233 ("TEFRA procedures") for taxable years .

Short answer: Based on the facts set forth below, for taxable years , your examination of the Taxpayer is subject to TEFRA procedures. Note, however, that this conclusion may change if any of the facts relied upon below are inaccurate or you have additional facts that I have not considered.

Facts

The Taxpayer () is a calendar year taxpayer that was created on or about . You are examining its taxable years . In ,

the Taxpayer was formed pursuant to a _____, as amended (“Formation Agreement”).

dated

The Formation Agreement contains several definitions regarding membership (e.g., “Members,” “Initial Members,” “
”). A “Member” is as provided in the

dated as of _____ (“LLC Agreement”).

The LLC Agreement (schedule 4.1) lists the members of the Taxpayer as follows:

Member Name	Membership Interest

_____ is a disregarded entity for tax purposes. It is wholly owned by _____, which is wholly owned by _____.

On Form 8886, Reportable Transaction Disclosure Statement, for taxable year _____, the Taxpayer listed as its members: (1) _____; (2) _____; and (3) _____. We are unclear whether _____ existed in _____ and transferred its interest in the Taxpayer to _____, or whether on _____, _____ reorganized into _____. We know from the Taxpayer, however, that during _____, _____ (1) was an owner of the Taxpayer, and (2) was a disregarded entity for Federal income tax purposes.

On its Form 10-K, Annual Report, for _____ filed with the Securities and Exchange Commission (_____) states that the Taxpayer is owned by _____, which is owned by _____, which is owned by _____.

On its Form 1065, U.S. Return of Partnership Income, and Schedule K-1, Partner's Share of Income, Credits, Deductions, Etc, for taxable years _____, the Taxpayer provided the following information:

[illegible]

During the course of this examination, the Taxpayer provided a written statement that
“is a NON-TEFRA partnership.”

Law

Generally, a partnership is subject to TEFRA proceedings unless it is a small partnership. A small partnership is a partnership is owned by 10 or fewer partners, each of whom is a C corporation, an individual, or an estate of deceased partner. IRC § 6231(a)(1)(A) and (B)(i). The small partnership exception does not apply to a partner who is a pass-thru partner during the taxable year. Treas. Reg. § 301.6231(a)(1)-1(a)(2). A pass-thru partner is “a partnership, estate, trust, S corporation, nominee, or other similar person through whom other persons hold an interest in the partnership with respect to which proceedings under this subchapter are conducted.” IRC § 6231(a)(9).

The determination of whether a partnership satisfies the small partnership exception is made each taxable year. Treas. Reg. § 301.6231(a)(1)-1(a)(3). In the first instance, a TEFRA determination is made based on the partnership’s tax return; if the Service reasonably determines that a partnership is or is not subject to TEFRA, than that determination is presumed correct, even if it is erroneous. IRC § 6231(g)(1) and (2).

For each year at issue, the partnership return states that the Taxpayer is not subject to TEFRA and lists only corporations as partners. Looking at the tax returns in isolation, we could have reasonably concluded that the Taxpayer was not subject to TEFRA. During the course of the examination, however, we obtained additional facts showing that the Taxpayer had partners that were disregarded entities in

), and in . Disregarded entities are “other similar person[s] through whom other persons hold an interest in the partnership.” Accordingly, they are pass-thru partners. As pass-thru partners, they disqualify the Taxpayer for the small partnership exception and make the Taxpayer subject to TEFRA proceedings.

With this additional information, I do not think it is reasonable for us to rely on the representations on the Taxpayer’s return. Accordingly, your examination of the Taxpayer’s returns for should be conducted using TEFRA procedures described in the Flow-Through Entity Manual at IRM 4.31.2.

Please call or e-mail me if you have any questions or would like to discuss this further.
